

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES SMILLIE,

Plaintiff-Appellant,

v

BARRINGTON GROUP, INC,

Defendant-Appellee.

UNPUBLISHED

September 8, 2009

No. 286245

Oakland Circuit Court

LC No. 2007-084783-NO

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

In this premises liability case, plaintiff Charles Smillie appeals as of right the trial court's order granting summary disposition in favor of defendant Barrington Group, Inc (Barrington). Because we conclude that the trial court properly dismissed Smillie's claims, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

I. Basic Facts and Procedural History

Smillie is a tenant in an apartment complex owned by Barrington. In May 2007, Smillie, who was 73 at the time, fell while walking from his car to his apartment. Smillie sued Barrington in July 2007 for damages related to the injuries from this fall. In his complaint, Smillie alleged that he slipped and fell on an oil slick in the parking lot and that Barrington was liable for damages arising from the slip and fall. Specifically, Smillie alleged that Barrington breached its common law duty to keep the parking lot safe for its invitees and breached its duty to refrain from creating public nuisances.

In December 2007, Smillie amended his complaint to correct a clerical error, but continued to allege that he slipped on an oil spot. However, by the time of his deposition in March 2008, Smillie no longer asserted that he slipped on an oily spot; he now claimed that a pothole caused his fall.

In April 2008, Barrington moved for summary disposition of Smillie's claims. Barrington argued that Smillie could not prove that his injuries were proximately caused by a defect in the parking lot at issue and, even if he could, any such defect was open and obvious as a matter of law. Barrington also argued that Smillie's public nuisance claim must be dismissed because Smillie could not establish that the condition of the parking lot amounted to a nuisance. In response, Smillie argued that there was a question of fact as to whether a pothole caused his

fall and that the open and obvious doctrine did not apply to Barrington's statutory duty to maintain the parking lot. Smillie also argued that the potholes were nuisances.

After hearing the parties' arguments, the trial court concluded that there was no evidence that Barrington breached an applicable statutory duty. The trial court also concluded that any hazards in the area noted by Smillie as the place of his fall were open and obvious as a matter of law. For these reasons, the trial court dismissed Smillie's claims.

Smillie now appeals.

II. Summary Disposition

On appeal, Smillie argues that the trial court improperly granted summary disposition of his premises liability claim.¹

A. Standard of Review

This Court reviews de novo a trial court's decision to grant summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Causation

Smillie had the burden to prove that Barrington breached a particular duty—whether based on common law premises liability, common law nuisance, or a statutory duty imposed as part of his tenancy agreement—and that the breach was the cause in fact of his injuries. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (noting the elements for a common law negligence claim); *Capitol Properties Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 427-429; ___ NW2d ___ (2009) (noting that nuisance claims generally require a showing of harm); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (stating that a plaintiff may only recover damages for a breach of contract that were proximately caused by the breach). An act or omission is a cause in fact if the injury could not have occurred without that act or omission. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). A plaintiff need not prove that the act or omission was the sole cause of his

¹ Smillie did not challenge the trial court's dismissal of his nuisance claim. Therefore, we shall limit our analysis accordingly.

or her injuries, but must introduce evidence permitting the jury to conclude that the act or omission was a cause. *Id.* It is insufficient “to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

In its motion for summary disposition, Barrington presented evidence that Smillie testified that he did not know what caused him to fall and that there was otherwise no evidence linking a defect in the parking lot at issue with Smillie’s fall; and, absent such a link, Smillie could not show that, but for Barrington’s acts or omissions, he would not have suffered the fall. Once Barrington properly challenged the sufficiency of Smillie’s evidence concerning causation, Smillie had to respond by presenting evidence sufficient to establish a question of fact for the jury on the issue of causation or risk the dismissal of his claims. *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

Our review of Smillie’s deposition makes clear that he had no evidence that a pothole caused him to fall other than the facts that he fell in the parking lot and that there were potholes in the parking lot. He lost consciousness upon falling and testified that he had no recollection of the events immediately preceding his fall. There were no witnesses to the fall and apparently nothing about the nature of the injury that demonstrated the particular mechanism of injury. Plaintiff testified instead that he did not think he would have tripped and fallen without reason and that since his review of the photographs of the parking lot showed multiple potholes, he believed that a pothole was the cause of his fall. For example, he testified that “I know *somehow or another*, I fell here going to the apartment (emphasis added).” He also stated, “I don’t know the events preceding it or where it was or the events that followed.”

Although at various points in his deposition Smillie states that he fell as a result of a hole, review of the entire deposition make clear that this testimony was not based upon any observations that he could recall, but instead his own attempt to define what he thought could plausibly explain why he fell. He admitted that his conclusion that he fell as a result of a hole was a “presumption”:

Q. And you recall your foot getting caught in a hole in that parking lot?

A. *No, I don’t recall. That’s a scientific presumption.*

Q. What do you mean by that?

A. *I had to trip and fall on something. I presume it was a hole.* [Emphases added.]

That plaintiff merely presumed he fell in a pothole was further evidenced by his statement, “I don’t think people fall with [sic] walking on a clear surface, a flat surface.”

We do not disagree that Smillie sincerely believes that he would not have fallen but for some hazard located in the parking lot and that he believes that that something was likely a pothole, but his belief alone, without evidence to support it, is insufficient to establish a question

of fact as to whether Barrington's conduct was the cause of his injuries. *Skinner*, 445 Mich at 164-165. "A valid theory of causation . . . must be based on facts in evidence" and "our case law requires more than a mere possibility or a plausible explanation." *Craig v Oakwood Hosp*, 471 Mich at 87.

Taking the testimony as a whole and considering it in the light most favorable to Smillie, *Smith*, 460 Mich at 454-455, we conclude that Smillie failed to present evidence sufficient to create a question of fact as to whether he fell as a result of an encounter with a pothole—or for that matter, an oil slick. Therefore, Barrington was entitled to summary disposition. MCR 2.116(C)(10). Given our resolution of this issue, we decline to address the applicability of the open and obvious doctrine to the facts of this case or whether the condition of the parking lot rendered it unfit for its intended use under MCL 554.139. The trial court came to the correct result regardless of its reasoning. See *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) (noting that this Court may affirm where the trial court reached the right result, "albeit for the wrong reason").

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro